

ARKANSAS SUPREME COURT

No. CR 05-691

NOT DESIGNATED FOR PUBLICATION

ANTHONY PAUL MOORE

a/k/a Paul Anthony Moore

a/k/a Paul Anthony Chet Moore

a/k/a Toney Paul Moore

a/k/a Anthony Moore

a/k/a Tony Paul Moore

Appellant

v.

STATE OF ARKANSAS

Appellee

Opinion Delivered

April 6, 2006

APPEAL FROM THE CIRCUIT COURT OF
PULASKI COUNTY, CR 2002-80, HON.
MARION HUMPHREY, JUDGE

AFFIRMED

PER CURIAM

Anthony Paul Moore a/k/a Paul Anthony Moore¹ was convicted by a jury of four counts of rape. He received a sentence of thirty years' imprisonment as a habitual offender on each count to be served concurrently. The Arkansas Court of Appeals affirmed. *Moore v. State*, CACR 03-1387 (Ark. App. September 22, 2004).

Subsequently, Moore timely filed in the trial court a petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1 claiming he did not receive effective assistance of counsel during his trial. The trial court denied the petition and Moore has lodged an appeal in this court from that order.

In the instant matter, appellant complains that trial counsel failed to argue that appellant was denied the right to due process under the Fifth and Fourteenth Amendments to the United States Constitution related to a pre-arrest delay of two-and-one-half years. This delay occurred between the time the warrants were issued for his arrest and the arrest. We find no error and affirm the trial court.

¹Mr. Moore's first names were transposed by the trial court in the matter currently before this court.

Appellant was accused of committing four counts of rape on December 5, 1998. Arrest warrants were issued in June 1999 and appellant was arrested in November 2001. The delay in appellant's arrest resulted from the police department's failing to enter the warrants into the ACIC (Arkansas Crime Information Center) computer system.

Prior to trial, appellant's trial counsel filed a motion to dismiss the charges based on denial of appellant's right to a speedy trial. The trial court held a hearing on the motion. Appellant maintained that he had been "charged" when the arrest warrants were issued, which triggered dismissal under speedy trial requirements. The prosecutor argued that appellant was being brought to trial within one year from the date of appellant's arrest, therefore no speedy trial issue existed. The prosecutor also contended that the State was allowed to commence prosecution against appellant within six years from the date the crime occurred, which is the statute of limitations period for the crime of rape. The trial court agreed that the statute-of-limitations period controlled and denied the motion.²

On direct appeal, appellant again argued that speedy trial requirements necessitated dismissal of the charges. The court of appeals disagreed and affirmed the trial court's holding. In *dicta*, the court noted that appellant did not raise a Fifth Amendment due process argument on appeal.

On appeal to this court, appellant claims that his trial counsel provided ineffective assistance by failing to pursue a pre-arrest delay/due process claim under the Fifth and Fourteenth Amendments. With regard to ineffective assistance of counsel, this court set forth the requirements for making such claims in *Weatherford v. State*, ___ Ark. ___, ___ S.W.3d ___ (October 13, 2005)

²During the hearing, the prosecutor stated she was unsure whether appellant's counsel intended "to couch this in the form of a speedy trial argument or more like a stale warrant argument." Although counsel responded that he intended to proceed with a speedy trial argument pursuant to the Sixth Amendment, the trial court made the following statement in rendering its decision:

THE COURT: Well, I'm going to rule on the basis of I think it's most applicable to Arkansas' statutes governing statute of limitations. And I'm going to rule on that basis. Even though I know you've done it under speedy trial, I think – I believe that the time on speedy trial is not applicable here. It would have been a stronger argument, I think, under the statute of limitations and it's within that six year window. That's the basis of the Court's ruling.

(*per curiam*):

The criteria for assessing the effectiveness of counsel are set out in *Strickland v. Washington*, 466 U.S. 668 (1984). The claimant must show first that counsel's performance was deficient, with errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and claimant must also show that this deficient performance prejudiced his defense through a showing that petitioner was deprived of a fair trial. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 38, 26 S.W.3d at 125. To rebut this presumption, the petitioner must show that there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, i.e., that the decision reached would have been different absent the errors. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004).

Judicial review of counsel's performance must be highly deferential, and a fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*). The totality of the evidence before the factfinder must be considered in determining a claim of ineffective assistance of counsel. *Greene*, 356 Ark. at 64, 146 S.W.3d at 876. We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

___ Ark. at ___, ___ S.W.3d at ___.

As a threshold issue, appellant must show that but for counsel's actions, he would have been entitled to dismissal of the charges based upon the due process argument. Under the Fifth Amendment to the United States Constitution, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.]" Within the context of criminal matters, the Court in *United States v. Marion*, 404 U.S. 307 (1971), and *United States v. MacDonald*, 456 U.S. 1 (1982), considered whether this due process requirement would provide a basis for dismissal of charges against a defendant if a pre-arrest delay resulted in actual prejudice. The United States Supreme Court and our courts answered in the affirmative provided the defendant has made a showing that the pre-arrest delay caused substantial prejudice to defendant's right to a fair trial and that the delay was done intentionally to gain a tactical advantage over the defendant. *Coleman v. Lofton*, 289 Ark. 573, 715 S.W.2d 435 (1986). *See also* *Forgy v. State*, 16 Ark. App. 76, 697 S.W.2d 126 (1985); *Young v. State*, 14 Ark. App. 122, 685 S.W.2d 823 (1985).

In his claim of due process violation, without citation to authority, appellant asserts a *presumption* of prejudice exists due to the delay in being arrested, although he fails to state any *actual* prejudice he suffered because of the delay. In *Coleman, supra*, we said:

[A] petition would be denied perfunctorily if only lapse of time were the argument. In our judgment the rules of criminal procedure requiring trial within a specified period are the outer limits of time to bring a defendant to trial, and trials occurring within those limits are not presumptively prejudicial. *Matthews v. State*, [268 Ark. 484, 598 S.W.2d 58 (1980).] Therefore, the lapse of time in this case was not presumptively prejudicial. The burden of proof was on [defendant] to show he was prejudiced by the pre-arrest delay.

289 Ark. at 576, 715 S.W.2d at 437. Therefore, due process considerations do not arise until prejudice resulting from the delay is proven by the party complaining of the prejudice.³ *Coleman, supra*. Appellant failed to meet his burden of proof regarding a showing of actual prejudice, as this court will not presume prejudice.

Additionally, appellant has not shown that the delay in arresting appellant was done intentionally in order to gain a tactical advantage over appellant, or what that tactical advantage may have been. Based upon the evidence in the record, the State's actions, although perhaps careless, were not intentional and certainly provided no tactical advantage to the State. Appellant failed to show he would have been entitled to dismissal of the charges under the two-prong test set out in *Marion*.

As to his claim of ineffective assistance under *Strickland*, appellant contends that trial counsel's performance was deficient "inasmuch as the trial court – and the Arkansas Court of Appeals – have already held as a matter of law that defense counsel relied on the wrong theory (speedy trial) in support of his motion to dismiss." However, this statement does not reflect either the trial court's ruling or the court of appeals' ruling. The trial court specifically made its ruling based on a "stale warrant" allegation rather than a Sixth Amendment speedy trial argument. That court held that the statute of limitations was dispositive in the matter and precluded a claim for

³However, an irrebutable presumption arises that defendant's right to a fair trial has been prejudiced when a criminal matter is instituted outside of the statute of limitations, which defines the outer limits of prosecution. *Coleman, supra*.

dismissal of the charges under a “stale warrant” theory. On appeal, the court of appeals did not state whether that court would have ruled in favor of appellant had the issue of pre-arrest delay been before the court; rather, the court merely noted that the issue was not before it.

Based on the trial court’s consideration and rejection of the very argument appellant now champions, and appellant’s lack of facts to support his argument, we cannot say that trial counsel’s actions were deficient in this matter. Trial counsel is not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Greene*, 356 Ark. at 73, 146 S.W.3d at 882; *Camargo v. State*, 346 Ark. 118, 128, 55 S.W.3d 255, 262-263 (2001). Appellant has not shown that counsel’s representation of appellant was deficient under *Strickland* or that counsel did not provide reasonable professional assistance to appellant.

Further, appellant alleges that the second prong of *Strickland* is satisfied by a presumption of prejudice resulting from the State’s taking “*three years* to inform [appellant] that he was a suspect in a crime[.]” (Emphasis in original.) The standard required to support a claim of ineffective assistance places the burden on the defendant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (*per curiam*). Allegations without factual substantiation are insufficient to overcome the presumption that counsel was effective. *Id.* at 413, 39 S.W.3d at 795. Further, conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003).

In the present matter, appellant contends that the actual prejudice requirement of *Strickland* is satisfied by the presumption of prejudice supporting his Fifth Amendment due process argument. Appellant’s argument fails for two reasons. First, as noted above, appellant’s underlying due process claim requires an actual showing of prejudice. *Coleman, supra*. Appellant failed to prove actual prejudice, and he has not cited authority to support a departure from the standards pronounced by the United States Supreme Court nor has he shown a satisfactory basis to overrule precedent.

Additionally, actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *Chenoweth v.*

State, 341 Ark. 722, 19 S.W.3d 612 (2000) (*per curiam*). Appellant now asks this court to depart from long-standing precedent to allow a presumption of prejudice to satisfy the second prong of *Strickland* in this matter. However, no case law supports appellant's argument on this point. We are not persuaded that appellant has made a showing of prejudice sufficient to rise to the level of actual prejudice required by *Strickland*. Thus, appellant failed to show he suffered actual prejudice as a result of trial counsel's actions. Appellant failed to show that he was either prejudiced as a result of the pre-arrest delay or that he was prejudiced as a result of the trial counsel's actions. Based on the totality of the evidence, we cannot say that the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland*. Therefore, we affirm the decision of the trial court.

Finally, appellant contends that the record before the trial court did not conclusively show that appellant's petition was meritless. Therefore, appellant argues he was entitled to a hearing on his petition. It is well-settled that the trial court has discretion pursuant to Rule 37.3(a) to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003). In accordance with this rule, a court is not required to conduct an evidentiary hearing if it can conclusively determine from the record that appellant's contentions are meritless. *Stewart v. State*, 295 Ark. 48, 746 S.W.2d 58 (1988). The trial court's order denying appellant's petition comported with our requirement that written findings must specify the parts of the file or record upon which the trial court relied upon in reaching its holding. Ark. R. Crim. P. 37.3(a). We find no basis to grant appellant's request for this court to reverse and remand the matter to the trial court for an evidentiary hearing, nor has appellant provided a valid basis to do so.

Affirmed.